No. 94-1806

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SHRICHAND CHAWLA, *et al.*,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE COURT APPOINTED FIDUCIARIES OF BCCI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the petition for writ of certiorari, BCCI Holdings (Luxembourg) SA, Bank of Credit and Commerce International SA, Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited, through their Court Appointed Fiduciaries, who were Defendants-Appellees in the court below are Respondents in this proceeding.*

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* Pursuant to Rule 29.1, the following are subsidiaries of BCCI Holdings (Luxembourg) SA not wholly owned: Italfinance International SpA; BCCI (Nigeria) Ltd.; BCCI (Swaziland) Ltd.; BCC Zimbabwe Ltd.; BCC Cameroon SA; BCC (Emirates); BCC (Misr) SAE; BCC Hong Kong Ltd.; BCCI Finance International Ltd.; Banco de Credito e Comercio de Investmento SA; BCC SAE; National Bank of Oman Ltd. (SAO); BCC Ghana Ltd.; BCC SA; PT BCC Pratama Leasing Indonesia; BCCI Leasing (Malaysia) Sdn. Bhd.; Kuwait International Finance Company SAK; Banque de Commerce et de Placements S.A.

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BCCI Holdings (Luxembourg) SA, Bank of Credit and Commerce International SA, Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Company (Overseas) Limited (collectively "BCCI"), through their Court Appointed Fiduciaries, oppose the petition for a writ of certiorari. Petitioners assert that a writ should issue to resolve a clear conflict among the circuits on the treatment of third parties in forfeiture actions. In fact, there is no genuine conflict among the circuits on the narrow issue presented here—whether a constructive trust can constitute a legal interest superior to the government's forfeiture rights. Accordingly, review by this Court is unnecessary, and, in all events, this case would be a

wholly inappropriate vehicle for resolving the issue that Petitioners seek to frame.

The circuit court below acknowledged the general proposition that a constructive trust, in some circumstances, may be imposed for the benefit of depositors who deposit their funds in a banking institution ignorant that the institution is insolvent or corrupt. But the court ruled that such a trust is, as its name implies, "constructive." It is imposed as an equitable remedy, at the time of litigation, and hence cannot defeat the government's forfeiture interest which attaches at the time of the underlying criminal activity. While other circuits have suggested (and in one case held) that a constructive trust can in certain circumstances take precedence over the government's forfeiture rights, in none of those few cases has a lower court analyzed the effect of the relation-back doctrine, which the court below found determinative. Thus, while the lower courts have reached differing results, the legal principles underlying their decisions are not genuinely in conflict. The narrow issue addressed by the court below has yet to be explored by the other courts of appeals, and its consideration by the Court in this case would be premature.

Moreover, consideration of that narrow issue in the overall context of this case would be especially unwarranted. First, this case does not present the broad issue of how innocent depositors should be treated in the context of a forfeiture of a bank's assets. Rather, it presents the much narrower question of *who* should represent the interests of such depositors in this multinational insolvency. Petitioners' invocation of the constructive trust doctrine is calculated to usurp the role of the Court Appointed Fiducaries as the judicially authorized representatives of the worldwide depositors and creditors of BCCI, and to turn this forfeiture action into a separate liquidation of BCCI's U.S. assets in direct conflict with the official liquidation proceedings currently in progress.

This Court's consideration of the interplay between constructive trust and forfeiture would therefore be complicated by the preliminary issue of whether these Petitioners are the appropriate parties to assert these claims in derogation of the rights of the Court Appointed Fiduciaries. Second, Petitioners raised their assertion of a constructive trust reaching all of BCCI's forfeited U.S. assets only as an afterthought in the district court. Not only would this Court be left to consider the issue in the absence of genuine development by the various courts of appeals, it would have to do so in the absence of a meaningful record even in the instant case. Third, even were the Court to rule that a constructive trust could, as an abstract legal matter, take precedence over the government's forfeiture rights, given the decision of the district court, such a ruling would have no practical impact on the result in this case, but would have a substantial adverse impact on the rights of worldwide victims of BCCI. Unlike the court of appeals, the district court held that a constructive trust may take priority over a forfeiture where equitable considerations (on which the constructive trust doctrine turns) favor its imposition. But the district court has already ruled, in the exercise of its sound discretion, that the equities simply do not support imposition of such a trust in the instant case. A remand with directions that the doctrine can supply a basis for a legal interest superior to the government's is likely to yield the same outcome, albeit with the significant delay of any distribution to victims that prolonging this litigation would inescapably entail.

STATEMENT OF THE CASE

Because the unique facts and procedural history of this case make clear why it is an inappropriate vehicle for resolving general issues of forfeiture law, the Court Appointed Fiduciaries expand upon the recitation set forth by the court below.

A. The Collapse of BCCI and the Appointment of the Court Appointed Fiduciaries

On July 5, 1991, bank regulators in Luxembourg, the Cayman Islands, the United Kingdom, the United States and elsewhere, in a coordinated effort, seized and shut down BCCI. Appendix to Petition for Writ of Certiorari ("Pet. App.") A-2. Following these seizures, judicial authorities in the Cayman Islands, where BCCI Overseas and ICIC Overseas are incorporated, in Luxembourg, where BCCI Holdings and BCCI SA are incorporated, and in the United Kingdom, where BCCI SA had its major banking operations, appointed fiduciaries to take control of the affairs of the respective companies. Pet. App. A-3. At the time of the seizures, BCCI had hundreds of thousands of depositors in 69 countries throughout the world. The Court Appointed Fiduciaries have estimated that the deficiency between assets and liabilities of the two principal BCCI operating subsidiaries, BCCI SA and BCCI Overseas, amounts to $10.5 billion.

The collapse of entities of the breadth and complexity of BCCI has created unprecedented worldwide problems and has precipitated a furious scramble for the remains of these hopelessly insolvent companies. The Court Appointed Fiduciaries have been judicially charged with the responsibility to realize and maximize the recovery of BCCI's assets, which are to be distributed on the basis of equal treatment among depositors and creditors worldwide in the insolvency proceedings now pending in Luxembourg and the Cayman Islands. Appendix to Court Appointed Fiduciaries' Brief in Opposition to Petition for Writ of Certiorari. ("Opp. App.") 22a. Through the Plea Agreement described below, the assets of BCCI located in the United States which have been or will be forfeited, an amount likely to exceed $1 billion, will be a significant source of funds available to compensate the innocent victims of BCCI.

B. Proceedings Below

1. *The Plea Agreement*

In connection with a series of criminal and regulatory charges filed against BCCI in the United States, the Court Appointed Fiduciaries and representatives of the Department of Justice, the District Attorney of New York, the Federal Reserve and numerous other state and federal agencies commenced negotiations toward a comprehensive Plea Agreement, which was signed and filed in the district court on December 19, 1991. Opp. App. 20a-48a. The Plea Agreement was presented to and approved by courts in Luxembourg and the Cayman Islands supervising the worldwide liquidation of the BCCI entities. Pet. App. A-4.

The Plea Agreement required BCCI, through the Court Appointed Fiduciaries, to plead guilty to federal and state criminal charges and to agree not to contest charges filed by the Federal Reserve. It further provided that the district court would enter an order pursuant to 18 U.S.C. § 1963(a) forfeiting all BCCI assets located in the United States. Under the Plea Agreement, the Attorney General agreed that half of the forfeited assets would be transferred to the Worldwide Victims and Creditors Compensation Fund administered by the Court Appointed Fiduciaries. The remaining half would be used at the discretion of the Attorney General for various enumerated purposes, including "restitution to victims of BCCI, which may include remission to the Court Appointed Fiduciaries . . . for the purpose of facilitating an increase in assets available for distribution by the Court Appointed Fiduciaries to innocent worldwide victims of BCCI . . . ." Opp. App. 31a-32a.

The Plea Agreement was recognized by the courts that approved it as the best settlement that could practically be obtained for the innocent depositors and creditors. It resolved all charges, eliminating the risk that *all* of BCCI's forfeited assets would be retained by the United

States and assuring that substantial assets would be made available to worldwide victims—including the depositors whom the instant Petitioners purport to represent. The U.S. assets of BCCI could then be distributed with other assets in an orderly and fair manner through global proceedings, thereby preventing piecemeal and unfair distribution of assets to individual claimants at the expense of the general body of creditors and depositors worldwide.

The Plea Agreement was challenged by putative U.S. creditors who sought in the bankruptcy court in New York to enjoin the acceptance of the agreement by the district court. *See In re Smouha*, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (2d Cir. 1992). As Judge Keenan found, such creditors were "essentially seeking not only to 'cut in line' ahead of innumerable other BCCI creditors and depositors, but to derail a Plea Agreement of tremendous sociopolitical significance that will ultimately send [substantial assets] to the worldwide 'victims' fund." *Id.* at 928.

After the challenges in New York failed, other putative creditors sought to prevent acceptance of the Plea Agreement by the district court. Rejecting those requests, the district court concluded:

> [T]he plea agreement now before the Court reflects on a truly global measure extraordinary efforts and amazing cooperation of a multitude of signatories representing a myriad of jurisdictions to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through that plea resolution, to locate and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the plea agreement is that those extraordinary efforts, that amazing cooperation, shall continue.
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> * * * *

> Through the world-wide victims fund to be created pursuant to the agreement, innocent victims of BCCI's wrongdoing can recover at least a portion of lost assets in as fair a manner as possible—equitable, orderly, and expeditious. Because the fund will be administered on a global scale through unified proceedings, piecemeal and unfair distribution can be avoided.

Opp. App. 52a-53a.

2. *The Claims by Petitioners*

In the district court, Petitioners represented themselves to be a class of all BCCI depositors worldwide who were plaintiffs in a RICO action styled *Hamid v. Price Waterhouse*, 15 RICO Law Rep. 1234 (C.D. Cal. 1992), *aff'd*, 51 F.3d 1411 (9th Cir. 1995), Pet. App. A-35-72 (*"Hamid"*), filed shortly after the closing of BCCI. They claimed *all* of the money forfeited under the first and second forfeiture orders. The result of the instant claims have been that to date *none* of the $451 million collected in those orders has been available to go to victims.

In the three-page submissions setting forth their claims, Petitioners asserted no particular property interest or theory of recovery, but instead simply referenced their third amended complaint in *Hamid*. That complaint was subsequently dismissed with prejudice by the United States District Court for the Central District of California. Pet. App. A-72. The United States Court of Appeals for the Ninth Circuit unanimously affirmed the dismissal holding that Petitioners had no standing to assert the claims and were engaged in an inappropriate effort "to jump ahead of other creditors in priority and obtain greater shares of the failed bank's assets . . . ." *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1420 (9th Cir. 1995), Opp. App. 18a. In reaching its decision, the Ninth Circuit cited, with approval, the decision of the

District of Columbia Circuit which is the subject of the instant petition.[1]

3. *The District Court Decision*

In rejecting Petitioners' claims, the district court (Judge Joyce Hens Green) first noted that there was a serious question whether Petitioners could properly claim to represent the BCCI depositors, since their motion for class certification in the California case had never been granted, that case had been dismissed, and no motion for class certification had even been filed in this proceeding. Pet. App. A-22. The court then reviewed the shifting theories under which Petitioners had sought to establish their entitlement—as tort claimants in their filed claims, as general creditors during some of their argument to the court, and still later during that argument as the beneficiaries of a constructive trust. Pet. App. A-25-26. "Generously" treating petitioners as though they had alleged a constructive trust theory, Pet. App. A-26, and treating the allegations in the claim as true, Pet. App. A-27, the district court exercised its discretion to refuse the request for imposition of a constructive trust on equitable grounds because to do so would "cause a gargantuan disruption of the global liquidation . . . [and] significantly harm the abilities of other BCCI creditors to recover fair portions of lost funds." Pet. App. A-28.[2]

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[1] Contrary to Petitioners' suggestion, Petition for Writ of Certiorari ("Petition") at 8, the Ninth Circuit did not rely on issues of ripeness in denying their claim but squarely held that these Petitioners lack standing to assert the claims they were advancing. Opp. App. 18a-19a.

[2] Similarly, the court dismissed the Petitioners' claims as general creditors on the grounds that they had no legal interest in any identifiable asset of BCCI which had been forfeited, could not claim "vested" or "superior" interest to any asset, and could not meet the § 1963(1)(6)(B) requirement of being a "bona fide purchaser for value." Pet. App. A-29-30. Petitioners' general creditor theory is not in issue on this petition.

4. The Court of Appeals Decision

A unanimous panel of the Court of Appeals for the District of Columbia Circuit affirmed the order of the district court. While the district court held, as a matter of equity, that a constructive trust should not be imposed in the unusual circumstances of this case, the court of appeals held, as a matter of law, that a constructive trust cannot take precedence over forfeiture. The court ruled that a constructive trust is a judicially-imposed remedy that attaches as a consequence of litigation. As such, it cannot serve to establish the "vested" or "superior" interest necessary to defeat the government's forfeiture that attaches, by statute, at the time of the underlying criminal activity. Having resolved the case based on the statutory relation-back requirement, the court of appeals had no occasion to address the equitable considerations that persuaded the district court, under the particular circumstances of this case, to deny imposition of the equitable remedy of a constructive trust. Pet. App. A-11-12.

REASONS FOR DENYING THE WRIT

This case is not an appropriate vehicle for addressing general issues concerning the rights of innocent third parties in RICO forfeiture proceedings. The purported split among the courts of appeal over the narrow issue which Petitioners argue justifies granting the writ—whether a constructive trust can trump the government's forfeiture interest—is illusory. In fact, the court below is the only court to have addressed the impact of the relation-back requirement upon the availability of a constructive trust in the forfeiture setting. There is thus no genuine split among the circuits that would make it appropriate for this Court to grant certiorari.

Moreover, quite apart from the absence of a split among the circuits, the narrow question regarding the interplay between constructive trust law and forfeiture rules is not presented here in a manner amenable to this Court's review. Petitioners do not purport to represent

a group of individuals with claims to particularized, traceable assets of BCCI that might appropriately be subject to a constructive trust; rather, they are attempting to usurp the role of the Court Appointed Fiduciaries, who represent all the depositors of BCCI, and take for themselves the role of liquidators of these insolvent enties. Because Petitioners have struggled unsuccessfully to define a legitimate role for themselves, they have struggled as well to define a coherent theory of recovery. As a result, they only raised their constructive trust argument at oral hearing as an afterthought, and the record is thus devoid of the facts necessary for this Court to consider the presented question. Certiorari would be particularly inappropriate here because it is highly unlikely this Court's resolution of the legal issue presented would affect the district court's prior rejection of these claims on equitable grounds and, hence, would not change the ultimate outcome. However, the delays associated with certiorari review and any remand would surely impair the ability of the Court Appointed Fiduciaries to expedite an equitable distribution to BCCI's long-suffering victims.

I. THERE IS NO GENUINE CONFLICT AMONG THE CIRCUITS CONCERNING THE NARROW ISSUE PRESENTED BY THIS CASE.

Petitioners spend considerable effort setting forth the legislative history of the amendments which granted innocent third-parties a right to challenge the forfeiture of assets in which they claim an interest. Petition at 15-21. Petitioners then wrongly suggest that a grant of certiorari would provide an opportunity to resolve a conflict among the circuits concerning the effect of a constructive trust on the government's forfeiture rights and provide useful guidance to the lower courts concerning the appropriate role and rights of such third parties in forfeiture proceedings. In fact, this case presents no such opportunity.

The only issue of forfeiture law raised by this case is the narrow issue decided by the court of appeals concerning the interplay of the constructive trust remedy and the forfeiture statute.[3] Petitioners argue that certiorari should be granted to resolve a conflict between the District of Columbia Circuit's resolution of that issue in this case and decisions of the Second, Sixth and Seventh Circuits in what Petitioners contend are similar cases.[4] Review of the decisions cited by Petitioners reveals, however, that none addressed the issue decided by the court below—whether the relation-back doctrine in the forfeiture statute is inconsistent with the imposition of a constructive trust. Accordingly, there is no genuine conflict for this Court to resolve.

In *Schwimmer*, the court discussed whether the equitable nature of a constructive trust disqualified it from being a "legal" interest as required by Sec. 1963(1)(6)(A) and concluded, as did the District of Columbia Circuit in this case, that it did not. 968 F.2d at 1582. The court then remanded the case for a determination as to whether the factual predicate for imposing a constructive trust had been established. *Id.* at 1584. In *Campos*, the

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[3] Petitioners have abandoned the argument, which has been repeatedly rejected, that general creditors have sufficient legal interest in specific property to challenge a forfeiture. *See United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) ("a general creditor has no interest in particular assets or funds that warrants an amendment of an order of forfeiture under § 1963(1)(6)(A)."), *United States v. Campos*, 859 F.2d 1233, 1239 (6th Cir. 1988); *see also United States v. $20,193.39 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) (holding in a civil forfeiture that "[u]nlike secured creditors, general creditors cannot claim an interest in any particular asset that makes up the debtor's estate. For this reason, the federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property.")

[4] *See United States v. Schwimmer*, 968 F.2d 1570 (2d Cir. 1992), *United States v. Campos*, 859 F.2d 1233 (6th Cir. 1988), and *United States v. Marx*, 844 F.2d 1303 (7th Cir. 1988).

court merely listed constructive trust among a litany of the types of property interests which might be superior to the government's claim, but the court engaged in no further analysis of the subject, and took no steps to impose a constructive trust. 859 F.2d at 1239. In *Marx*, the court addressed whether state law would recognize a constructive trust on the facts presented, 844 F.2d at 1307-09, but did not discuss the relationship of a constructive trust to the forfeiture statute. At no time did these courts even consider, much less resolve, whether imposition of a constructive trust was consistent with the relation-back doctrine of RICO's statutory forfeiture scheme, the basis of the court of appeals' decision here.[5]

Marx, the only case in which a trust was actually imposed, is particularly instructive in this regard. The trust at issue in *Marx* was not one which was sought as a remedial device to prevent the unjust enrichment of a malefactor, which is the basis for Petitioners' argument that such a trust should be imposed here. Rather, the trust imposed in *Marx* resulted from the fact that the assets in question, stock shares, had been given to the defendant to hold for the benefit of claimant. 844 F.2d at 1306-07. Claimant was therefore entitled to the assets as the beneficiary of an express trust or, under Wisconsin law, as the beneficiary of a "constructive" trust if the defendant's illegal activities that gave rise to the forfeiture breached the express trust. *Id.* at 1307-08. The facts in *Marx* present none of the concerns that underlie the decision below, and there is no genuine conflict between the two decisions.

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[5] As the court below found, (Pet. App. A-12), the relation-back doctrine is an integral part of RICO's statutory remedial scheme which explicitly vests title to forfeited assets in the United States at the time of the criminal act. See 18 U.S.C. § 1963(e) ("All right, title and interest in property described in subsection (a) [forfeitable property] vests in the United States upon the commission of the act giving rise to forfeiture under this section.")

Because they do not address the interplay between the remedial device of a constructive trust and the relation-back requirement in the forfeiture statute, these three decisions are not in conflict with the decision below. This Court should allow this narrow question—the relationship between the relation-back doctrine and constructive trusts—to develop in the courts of appeals, should the issue again arise in future cases, and grant certiorari to review the issue only if a true conflict develops. It would be premature to grant certiorari now.

II. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO ADDRESS QUESTIONS OF GENERAL APPLICABILITY CONCERNING THE TREATMENT OF THIRD PARTIES IN RICO FORFEITURE PROCEEDINGS.

Even if an issue worthy of consideration on certiorari were presented, this case would be an inappropriate vehicle for its consideration. The collapse, regulatory seizure, multiple criminal investigations, prosecutions, and related civil proceedings of BCCI represent an unprecedented international insolvency. The Plea Agreement and resulting forfeiture growing out of this unprecedented insolvency are equally unique. The Court Appointed Fiduciaries not only represent the institutions in resolving criminal and civil liability, they also represent the interests of BCCI's worldwide depositors and other creditors in trying to obtain as much as possible for these victims of BCCI—including petitioners—so that they may recover at least some of what they have lost through coordinated global insolvency proceedings that seek to treat them fairly and non-preferentially.

This unusual factual background renders this an inappropriate vehicle for the development of rules of general applicability that would meaningfully guide lower courts in the application of RICO's forfeiture provisions to other matters.

A. Petitioners Do Not Represent The Interests Which They Purport To Advance In This Matter.

Notwithstanding their claims (Petition at 4), Petitioners do not represent the worldwide depositors of BCCI. Their attempt to act as class representatives for these depositors was rebuffed by the district court in California and the Ninth Circuit which dismissed their complaint. Moreover, Petitioners' claim to represent this class was never presented to the courts below in a manner that would have allowed them to address the adequacy of their purported representative status. Hence, major questions of standing will inescapably confound any disposition of Petitioners' claims, whatever theory of recovery they advance.

In sharp contrast to Petitioners' self-appointed status, the Court Appointed Fiduciaries, who caused BCCI to accept the Plea Agreement and consent to the forfeiture here challenged, are the judicially-appointed representatives actually (not constructively) entrusted to protect the depositors. It was the judgment of the Court Appointed Fiduciaries, explicitly concurred in by their appointing courts,[6] that agreeing to forfeiture pursuant to the terms of the Plea Agreement was in the best interest of the depositors. Petitioners' authority to act as class representatives has never been recognized; they are not subject to the limitations and supervision generally imposed upon class representatives;[7] they should not be allowed to impose their views to override the considered judgment of the Court Appointed Fiduciaries and their supervising courts.[8]

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[6] *See supra* p. 5.

[7] *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981) ("Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.")

[8] *See In re Sunrise Securities Litigation*, 916 F.2d 874, 889 (3d Cir. 1990) (rejecting RICO class action by depositors because

B. The Record In This Case Has Not Been Sufficiently Developed To Allow Thoughtful Consideration Of The Issue Presented By Petitioners.

While Petitioners are asking this Court to consider whether, and under what circumstances, a constructive trust can defeat the government's claim to forfeited assets, the record below is devoid of facts concerning the nature and scope of the trust which Petitioners seek to have imposed. Petitioners are, in essence, asking this Court to interpret the law in a vacuum.

The absence of a meaningful record is explained in part by the fact that the claim for a constructive trust was an afterthought, first requested by Petitioners at the end of the hearing in the district court. Petitioners' initial submission as well as their brief in the district court simply relied upon their since-dismissed complaint in *Hamid* and contained no mention of a constructive trust. Petitioners first suggested constructive trust as a theory in oral argument before the district court, and they offered no explanation concerning the nature and scope of the trust that they proposed. Pet. App. A-26. Similarly, while pressing their constructive trust theory in the court of appeals, Petitioners again failed to particularize the parameters of their requested remedy or to provide any of the facts that would allow the court to determine how and to what extent the constructive trust they sought to have imposed would actually be applied to the forfeited assets.

That the constructive trust theory was offered as an afterthought is not surprising given that a trust is not what Petitioners are truly seeking. The petition sets forth black letter rules concerning the circumstances that must exist before the common law will impose a constructive

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it would threaten settlement negotiated by the FDIC as receiver and would interfere with ratable distribution to depositors and creditors).

trust. Petition at 23-24. The purpose of the remedy is to prevent the party holding legal title to the asset from being allowed wrongfully to retain the benefit of the asset. Accordingly, as a remedial device, the common law creates the fiction that the asset is held "constructively" in trust and is required to be paid over by the wrongdoer to the injured party.

In the instant case there can be no claim that the assets at issue will be beneficially retained by any wrongdoer. What Petitioners are truly seeking is not the creation of a trust—there is already a trust in place in the form of the Worldwide Victims Fund. What Petitioners want is the right to be placed in charge of how those funds are distributed, to usurp the role of the Court Appointed Fiduciaries in liquidating BCCI's U.S. estate. They seek to assert a constructive trust only because their other attempts to gain control over the assets have been rebuffed. In these circumstances, this case does not present a record amenable to the promulgation of forfeiture rules of general applicability.

C. Granting Certiorari Will Have No Effect On The Ultimate Result Of This Matter And Will Delay Compensation To The Depositors And Creditors Of BCCI.

A final reason why this is an inappropriate case in which to address general questions of RICO forfeiture law is that this Court's decision would not affect the ultimate result in this matter. The review process itself, however, would significantly delay compensation to the depositors and other creditors of BCCI, thereby harming the very people Petitioners purport to represent. The Court Appointed Fiduciaries respectfully submit that granting a writ of certiorari in such circumstances is not an appropriate use of the Court's discretionary review authority.

Even if this Court were to rule that in some circumstances a constructive trust may limit a forfeiture, the

result for Petitioners' claim would not change. The district court has already held that the record simply does not support the imposition of a constructive trust in the circumstances of this case. Pet. App. A-20.[9] The extensive record developed by the district court in approving the Plea Agreement compelled this result when the district court first considered the issue; it will compel the same result should this case be remanded by this Court. That record led the district court to conclude that forfeiture, followed by remittance to the Worldwide Victims Fund, is the best way to achieve a prompt and fair distribution to all of BCCI's depositors and creditors. Given that prior determination, and the disruption in the global liquidation which the district court found would be caused by imposing a constructive trust, the district court's determination not to impose a trust represents a sound exercise of discretion which this Court, regardless how it may choose to rule on the legal interplay between legitimate constructive trusts and the rules of forfeiture, would have no occasion to upset.

The appropriateness of the district court's decision is clear in light of the decision of the Tenth Circuit in *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 763 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). There, as here, certain depositors sought to impose a constructive trust over an insolvent bank's assets rather than recovering ratably under the applicable statutory liquidation scheme. While recognizing the general proposition that a depositor has the right

[9] As they must, Petitioners concede that a constructive trust is an equitable remedy. Petition at 23-24. *See Healy v. Commissioner*, 345 U.S. 278, 282 (1953) ("[a] constructive trust is a fiction imposed as an equitable device for achieving justice"). As such, it is left to the court's discretion to impose the remedy only in circumstances where doing so would work justice. Here, the district court determined that imposing a constructive trust would work an injustice.

to recover deposits which were fraudulently induced, the court declined to impose a constructive trust, stating:

> . . . full restitution may be denied when it would sufficiently disrupt the orderly administration of the receiver's estate or otherwise result in inequitable treatment to other similarly situated depositors.

Downriver, 879 F.2d at 763 (citation omitted). The *Downriver* court stated, "In the absence of a false and fraudulent representation made specifically to the plaintiff, with respect to the financial condition of the bank, the plaintiff has no equity superior to the rights of other depositors or creditors of the bank . . . ." *Id.* at 764 (citation omitted). There, as here, the plaintiff depositors contended "that we might avoid this unequal treatment by permitting all depositors situated similarly to the plaintiffs to sue as a class to establish constructive trusts," but the court found that "to allow such suits would potentially jeopardize the orderly administration of the receiver's estate . . . ." *Id.* The court concluded, "Any remedy for fraudulent representations that affects, or potentially affects, all creditors belongs to the receiver, who asserts such claims for the benefit of all creditors." *Id.* (citation omitted). The court held that the assets of the insolvent bank were to be distributed ratably by the receiver.

The court's reasoning in *Downriver* applies with equal force in this case. Petitioners can assert no particularized harm; there would be tremendous disruption to orderly administration of the estate if a constructive trust were imposed; and, in all events, the right to act for the benefit of all depositors and to deal with generalized claims belongs to the Court Appointed Fiduciaries.

Moreover, the district court further found that, in any event, these Petitioners could not possibly meet the requirement for a constructive trust to trace the funds de-

posited directly to the asset over which a trust is sought.[10] The district court recognized the practical impossibility of engaging in that necessary tracing exercise in circumstances of this case where the claims of numerous separate depositors are at issue and where the deposits were made over a period of twenty years in an institution that operated in sixty-nine countries. Pet. App. A-28.

Nothing has changed since the district court made its determination not to impose a constructive trust—other than the Ninth Circuit's rejection of the civil claims upon which Petitioners' request for a constructive trust was based—and the rationale of *Downriver* remains applicable. Accordingly, even if this Court were to determine that in some cases a constructive trust can limit a forfeiture, on remand no trust would be imposed in this case. Regrettably, while this case remains under review, distribution of forfeited funds to BCCI's innocent depositors and creditors through the Worldwide Victims Fund will be delayed. This Court should not act to so penalize the innocent depositors and creditors in this case in the interest of deciding how to treat other innocent third parties in future cases.

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[10] *See United States v. Benitez*, 779 F.2d 135, 140 (2d Cir. 1985) ("It is hornbook law that before a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the wrongdoer," *citing* 5 A. Scott, *Law of Trusts*, § 521 (3d ed. 1967)).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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